No. 20,762

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOSEPH T. STRONG d/b/a STRONG ROOFING & INSULATING CO., RESPONDENT

PETITION FOR REHEARING *EN BANC*

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PETITION FOR REHEARING *EN BANC*

The National Labor Relations Board petitions for rehearing *en banc* of that portion of the Court's decision setting aside the requirement in the Board's order that respondent pay fringe benefits due under its contract with the Union. In support of its petition the Board shows as follows.

In this proceeding, the Court affirmed the Board's finding that respondent violated Section 8(a)(5) and (1) of the Act. That finding rested upon evidence that respondent had untimely sought to withdraw from a multiemployer Association, ceased paying contractual fringe benefits, obtained a refund of security deposited to assure such payments, and thrice refused to sign the agreement (Slip op. pp. 5-6). To remedy

the unfair labor practices found, the Board directed respondent, *inter alia*, to execute and honor the agreement and to "pay the appropriate source any fringe benefits provided for in the . . . contract" (R. 19). The panel enforced the first requirement of the Board's order but denied enforcement of the benefit payment provision on the ground that it constituted "an order to respondent to carry out provisions of the contract . . . beyond the power of the Board" (Slip. op. p. 7). We request that the Court grant rehearing *en banc* of the latter portion of the panel's decision. It conflicts with decisions of four other courts of appeals (the only relevant decisions),[1] casts doubt on

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[1] *N.L.R.B.* v. *George E. Light Boat Storage, Inc.*, 373 F. 2d 762, 768 (C.A. 5); *N.L.R.B.* v. *Huttig Sash and Door Co.*, 362 F. 2d 217 (C.A. 4); *N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (C.A. 2), cert. denied, 385 U.S. 1001; *N.L.R.B.* v. *M & M Oldsmobile, Inc.*, 377 F. 2d 712 (C.A. 2); *Ogle Protection Serv. Inc.*, 149 NLRB 545, 547, enforced in relevant part, 64 LRRM 2792 (C.A. 6). Cf. *N.L.R.B.* v. *United Nuclear Corp.*, Civ. No. 8887, decided August 23, 1967 (C.A. 10). The first cited case is on all fours with this one. In *Huttig, supra,* and in *M & M Oldsmobile, Inc., supra,* the courts enforced Board orders directing employers who refused to sign a contract in violation of the Act to make the employees whole by giving the negotiated contracts retroactive effect and by paying interest at 6% on such sums as the employees may have lost by reason of the company's unlawful refusal. In *Sheridan Creations, Inc., supra,* the court's enforcement decree directed the non-signing employer to pay its employees "any additional compensation . . . to which [they] would have been entitled under the agreement" and to "fulfill all other obligations . . . which respondent would have had" if it had signed. A copy of that decree has been lodged with the Court and served upon respondent. In *Ogle supra,* the Board, with court approval, directed the employer to give retroactive effect to an unsigned agreement.

the scope of the Board's remedial power, and, we respectfully submit, is in error for the reasons set forth below:

1. The function of a Board order, as the Supreme Court has repeatedly held, is to restore the situation, "as nearly as possible to that which would have obtained but for the illegal" conduct. *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194.[2] Here, the record shows that, but for its refusal to treat the contract as binding, respondent would have made the required benefit payments on behalf of the employees. Thus, respondent's cessation of benefit payments and recovery of its security deposit were intertwined with its attempt to withdraw from the bargaining unit (R. 15). In ordering respondent to make those payments now, the Board is attempting to restore the *status quo* which would have obtained but for the unfair labor practices. The Board's broad statutory authority to order "such affirmative action . . . as will effectuate the purposes of the Act," Section 10(c), as authoritatively construed in *Phelps Dodge Corp.* v. *N.L.R.B.*, *supra*, thus authorizes the Board's order here.

We are aware of no authority prohibiting the Board from ascertaining the consequences of an unfair labor practice and fashioning its remedial order

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[2] Accord, *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344; *N.L.R.B.* v. *MacKay Radio Co.*, 304 U.S. 333; *Fibreboard Paper Prods. Co.* v. *N.L.R.B.*, 379 U.S. 203, 215-217. As those cases show, the Board has wide discretion in fashioning remedies, which is "subject to limited judicial review." *Phelps Dodge Corp.* v. *N.L.R.B.*, *supra.*

in light of the provisions of a collective bargaining agreement. Cf. *Corvallis Sand and Gravel Co.* v. *Hoisting Engineers, Local 701*, —— Or. ——, 419 P. 2d 38 (1966) (en banc), cert. denied, 387 U.S. 404.[3] On the contrary, in determining the back pay owed unlawfully discharged employees (*Chemrock Corp.*, 151 NLRB 1074, cf. *N.L.R.B.* v. *Central Ill. Pub. Serv. Co.*, 324 F. 2d 916, 918-919 (C.A. 7)), and to those deprived of benefits by a refusal to sign or honor an agreement (*M & M Oldsmobile, Inc.*, 156 NLRB 903, 917, *enforced*, 377 F. 2d 712, 715-716 (C.A. 2); *Huttig Sash and Door Co.*, 154 NLRB 811, 812, enforced, 377 F. 2d 964 (C.A. 8); *N.L.R.B.* v. *Huttig Sash and Door Co.*, 362 F. 2d 217 (C.A. 4); *K & H Specialities Co.*, 163 NLRB No. 79, 64 LRRM 1411; *New England Tank Industries*, 147 NLRB 598) the Board, with court approval, has customarily

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[3] Neither *N.L.R.B.* v. *Hyde*, 339 F. 2d 568, 572 (C.A. 9), nor *N.L.R.B.* v. *George E. Light Boat Storage, Inc.*, 373 F. 2d 762 (C.A. 5), relied upon by the panel, is *contra*. The latter case is precise authority for our position here (see n. 1, *supra*). In *Hyde, supra*, there was no finding that the employees were denied any benefits by their employer's refusal to sign the contract. Hence the Board's order, enforced by this Court, simply directed respondent to sign and honor the agreement. The statement in the Court's opinion here that "In general, the Board has no power to adjudicate contractual disputes" (slip. op. p. 7) is a dictum from *United Steelworkers* v. *American Int'l Aluminum Co.*, 334 F. 2d 147, 152 (C.A. 5), where the question decided was whether a District Court could order arbitration where some of the issues sought to be presented to the arbitrator paralleled those in a pending Board proceeding. The holding in that case that arbitration could proceed is consistent with our position here. See *Carey* v. *Westinghouse*, 375 U.S. 261, 268.

looked to the agreements that, but for the unfair labor practices, would have fixed the employees' compensation.

2. The panel's decision apparently rests upon an assumption that Section 301 of the Labor Management Relations Act, which confers jurisdiction upon federal courts to enforce collective bargaining agreements, deprives the Board of power to remedy the consequences of unfair labor practices flowing from a failure to honor or apply an agreement. The language of Section 301 does not suggest such a conclusion. And the National Labor Relations Act, far from stating that the Board must ignore the consequences flowing from an unlawful refusal to sign a contract because such consequences may conceivably be remedied in a contract action, expressly provides that the remedial power of the Board "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." Section 10(a) of the Act. The legislative history of Section 10(a) makes plain that in re-enacting it in 1947, Congress intended that the remedial power of the Board and the courts should exist concurrently. "By retaining the language which provides the Board's power shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of other remedies." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), 1 Legislative His-

tory of the Labor Management Relations Act, 1947, 52 (1947). See *New Orleans Typographical Union* v. *N.L.R.B.*, 368 F. 2d 755, 766 (C.A. 5).

The Supreme Court and the courts of appeals have recognized Congress' intent and have repeatedly stated that the Board is not deprived of jurisdiction to adjudicate or remedy unfair labor practices merely because an alternative judicial or arbitral forum may exist for resolving the issue as a contract matter. See *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197 (dictum); *Carey* v. *Westinghouse*, 375 U.S. 261, 268 (dictum); *Local 174, Teamsters* v. *Lucas Flour*, 369 U.S. 95, 101 n. 9 (dictum); *N.L.R.B.* v. *C & C Plywood Corp.*, 385 U.S. 421; *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432; *N.L.R.B.* v. *M & M Oldsmobile, Inc.*, 337 F. 2d 712 (C.A. 2); *New Orleans Typographical Union* v. *N.L.R.B.*, 368 F. 2d 755, 763 (C.A. 5). Nor, as those cases further show, does Congress' decision not to make a contract breach an unfair labor practice deprive the Board of jurisdiction to resolve contract issues which arise in the course of Board proceedings. *N.L.R.B.* v. *C & C Plywood Corp.*, 385 U.S. 421, 427.[4]

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[4] Indeed, prior to the recent Supreme Court decisions in *C & C Plywood* and *Acme Industrial Co.*, that Court never had occasion to pass upon a claim that the Board's jurisdiction was pre-empted by the asserted presence of a contract question or remedy. Rather, the question which had vexed that Court and commentators was whether, since issues presented in contract actions were also grist for the Board's mill, the courts had jurisdiction to proceed. *N.L.R.B.* v. *M & M Oldsmobile, Inc.*, 377 F. 2d 712, 715 (C.A. 2). See, *e.g.*, *Carey* v. *Westinghouse, supra; Smith* v. *Evening News Ass'n Co., supra*; Dunau, *Contractual Prohibition of Unfair Labor Prac-*

3. In sum, the question of respondent's fringe benefit liability arises in the context of a breach of respondent's statutory obligation and the Board's duty in enforcing public, not private, rights (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 267-270), to determine what would have occurred but for respondent's violation of the Act. See *Phelps Dodge Corp.* v. *N.L.R.B.*, *supra*; *N.L.R.B.* v. *George E. Light Boat Storage, Inc.*, *supra*, 373 F. 2d 768, n. 9. Furthermore, there is no record evidence that, had respondent signed and honored the agreement, its employees would nevertheless not have received the fringe benefits provided in the contract. In these circumstances, Section 10(c) of the Act empowers the Board, to remedy respondent's unlawful refusal to bargain by ordering it to pay the fringe benefits which it would have paid under the contract had it not refused to bargain. Indeed, permitting the Board to proceed, rather than remitting the Union at the conclusion of the Board proceedings to its contract rights, if any, avoids multiple proceedings and inordinate delay in the implementation of the Act. Cf. *N.L.R.B.* v. *C & C Plywood Corp.*, *supra*, 385 U.S. at 429-430; *N.L.R.B.* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 970 (C.A. 8).

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tices; Jurisdictional Problems, 57 Colum L. Rev. 52 (1957); Sovern, *Section 301 and The Primary Jurisdiction of the National Labor Relations Board*, 76 Harv. L. Rev. 529 (1963), and cases cited therein. Cf. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245.

CONCLUSION

For the reasons stated, we respectfully request that the Court grant rehearing en banc limited to the substantial question presented above.

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CERTIFICATE OF COUNSEL

Marcel Mallet-Prevost, Assistant General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith and not for the purposes of delay.

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